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9 **PAUL A.I. MENDIOLA**

**FILED**  
DISTRICT COURT OF GUAM

SEP 22 2006

**MARY L.M. MORAN**  
**CLERK OF COURT**

10  
11 **IN THE UNITED STATES DISTRICT COURT**  
12 **FOR THE DISTRICT OF GUAM**

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 vs.

16 PAUL A.I. MENDIOLA,

17 Defendant.

CRIMINAL CASE NO. 05-00029

**NOTICE OF OBJECTION  
TO BASE OFFENSE LEVEL  
CALCULATION**

18 COMES NOW, David Rivera, Esq., counsel for defendant PAUL A.I. MENDIOLA, and  
19 hereby OBJECTS to the calculated base offense level of 34 as stated in Paragraph No. 34 of the  
20 Presentence Investigation Report ("PSIR"). It is respectfully submitted that the base offense level  
21 should have been 30. With credit for the other adjustments that have been calculated the Total  
22 Offense Level should be at Level 25 (which level does not yet include an adjustment for  
23 downward departure based upon an anticipated 5K1.1 motion).

24 **Argument**

25 In Blakely v. Washington, 542 U.S. 296 (2004), the Supreme Court reviewed several of  
26 its decisions concerning sentencing, including Apprendi v. New Jersey, 530 U.S. 466 (2000), and  
27 held that the statutory maximum for Apprendi purposes is the maximum sentence a judge may  
28 impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

1 According to U.S. Probation they base their calculation of the base offense level as  
2 follows: "the defendant conspired to possess 420 gross grams of d-methamphetamine  
3 hydrochloride (*actual*). The base offense level is 34." (Emphasis added). This is a misstatement  
4 of relevant facts admitted to in the plea agreement entered into by the defendant.

### 5 **The Plea Agreement**

6 On or about May 16, 2005, in the District Court of Guam, defendant Paul Mendiola  
7 entered a plea of guilty to Count I of an indictment charging him with conspiracy to distribute  
8 approximately 420 grams methamphetamine hydrochloride. This plea was in accordance to the  
9 terms of a plea agreement filed with the Court on May 12, 2005. Line 8( c. ) of the plea  
10 agreement contains the relevant stipulated fact. In relevant part, line 8 ( c. ) states:

11 As part of the conspiracy, the defendant received three U.S. Postal  
12 Service Express Mail parcels which were mailed to him at 163  
13 Felis St. (Old Perezville), Tamuning, Guam, 96913. The defendant  
14 knew the parcels contained an aggregate amount of approximately  
420 grams, *gross weight*, of methamphetamine hydrochloride.  
(Emphasis added).

15 Nowhere in the plea agreement is there any reference to any "actual" amount of  
16 methamphetamine hydrochloride.

### 17 **Argument**

18 The United States Sentencing Commission Guidelines Manual emphasizes that the term  
19 "actual" when used in reference to methamphetamine refer to the weight of the controlled  
20 substance, itself, contained in the mixture or substance. United States Sentencing Commission,  
21 Guidelines Manual, §2D1.1, pg. 140, Note (B) (Nov. 2005). The defendant never admitted in the  
22 plea agreement or elsewhere that the 420 grams of methamphetamine referenced in the  
23 indictment was an "actual" amount. The stipulated facts clearly make reference only to a gross  
24 weight. The Base Offense Level calculated in line 34 of the Pre-Sentence Investigation Report  
25 is based upon an actual amount of 420 grams of methamphetamine hydrochloride. This violates  
26 Blakely and Apprendi in that it subjects the defendant to a maximum sentence that is not solely  
27 based on the facts reflected in a jury verdict or admitted by the defendant. Taken at face value,  
28 the gross weight of 420 grams of methamphetamine places the Base Offense Level not at level

34, but at level 30. With the additional adjustments reflected in paragraphs 35 (2 level decrease) and 40 (3 level decrease) the Total Offense Level should be level 25.

### Conclusion

To calculate the Base Offense Level on the basis of 420 actual grams of methamphetamine hydrochloride results in an offense level calculation that is not based on facts reflected either in a jury verdict or admitted by the defendant. This squarely contradicts the principals enunciated in Blakely and Apprendi. The volume that is referenced in the plea agreement is "an aggregate amount of approximately 420 grams, gross weight, of methamphetamine hydrochloride." This is what the defendant admitted to. There is simply no way that one can read this sentence to be a reference to an actual amount as defined by the Guidelines Manual. It is respectfully submitted that the Base Offense Level pertaining to 420 grams gross weight of methamphetamine is level 30. Therefore, the Total Offense Level, after consideration of the other adjustments reflected in the Pre-Sentence Investigation Report, should be level 25.

Respectfully submitted this 22<sup>th</sup> day of September, 2006.

THE LAW OFFICE OF TERRENCE M. BROOKS

By: 

David Rivera, Esq.

Attorney for Paul A.I. Mendiola